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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN JONESTOWN MASSACRE, a
doing business as designation for ANTON
NEWCOMBE, an individual,

Plaintiff,

vs.

JEFFREY DAVIES, an individual,

Defendant.

Case No: 13-cv-04005-NC

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

JURY TRIAL DEMANDED

Plaintiff alleges as follows:

1. BRIAN JONESTOWN MASSACRE (hereafter, “BJM”) is the professional name, recording project, live performance art and life’s work of plaintiff ANTON NEWCOMBE (hereafter, “Plaintiff” or “Newcombe”), which he began over 25 years ago in San Francisco. Since that beginning, Newcombe has produced, recorded and released more than a dozen albums of original music and played in venues across the

1 country and throughout the world as BJM. He has done so with a revolving cast of
2 musicians over the years, numbering 40 or more. One such musician was Defendant
3 JEFFREY DAVIES (hereafter, “Defendant” or “Davies”), who participated in BJM off-
4 and-on from 1992 to approximately 1999.

5 2. At all relevant times, Newcombe has managed, directed, supervised and
6 overseen the work of BJM and has, with very limited exception, been cited as and
7 credited for its entire creative output. From the very beginning of BJM, Newcombe has
8 exercised sole and exclusive ownership, administration and/or control of that creative
9 output (including the copyrights in and thereto) without interruption or objection of any
10 kind. More recently he has done so through two associated business entities, a
11 Recordings Ltd., a United Kingdom limited company, and Tepid Peppermint
12 Wonderland Music (ASCAP), a doing business as designation, both of which he
13 controls.

14 3. Newcombe lived in San Francisco from the inception of BJM in or about
15 1988 through approximately mid-1997. During that period, BJM was based in San
16 Francisco, all of its participants (including Davies) lived and rehearsed here, and the
17 band played the majority of its live performances in the San Francisco Bay Area.

18 4. During this period, most if not all of the BJM musical compositions were
19 created, and sound recordings were produced and recorded, in San Francisco. These San
20 Francisco works have been far and away the most renowned and economically
21 successful BJM works as well as the works comprising most of the works at issue in this
22 case (the latter hereinafter referred to collectively as the “Subject Works”).

23 5. In or about May 1997, at a law office in San Francisco, Newcombe met
24 with the other musicians who performed with BJM at the time, including Davies. At that
25 meeting, all present discussed the creative contributions and the rights in and to the
26 existing Subject Works of those involved in BJM. Among other things, all present
27 confirmed and acknowledged that out of all of the musical compositions, Davies was
28 entitled to a songwriter credit for three songs only: “Straight Up and Down,” “Monster,”

1 and “Straight Up and Down II.” Further, all present confirmed and acknowledged that
2 neither Davies nor any other outside participant in BJM had any interest in any sound
3 recordings. In accordance therewith, all present directed Newcombe’s attorney to
4 register BJM’s works (both musical compositions and sound recordings) to reflect the
5 above.

6 6. Notwithstanding those copyright registrations, and almost 16 years to the
7 day after said meeting, Davies, via his counsel, threatened suit against Newcombe,
8 claiming to be “co-author” and thus co-owner of the Subject Works and asserting a claim
9 for a share of the proceeds from the exploitation of those works. A true and correct copy
10 of one such communication is attached hereto as Exhibit A.

11 7. As might be expected, the Subject Works consist of musical compositions
12 – almost all of which Newcombe wrote in whole or substantial part – and recorded
13 musical performances – all of which Newcombe produced and recorded at his own
14 expense as well as directed and in which he was the featured performer, musician and
15 vocalist. All of the Subject Works are copyrighted or copyrightable works.

16 8. Davies’ inspiration in emerging literally out of nowhere with these claims
17 more likely than not derived from the well-known and by-now ubiquitous use of
18 “Straight Up and Down” as the theme for the hit HBO series *Boardwalk Empire*, now in
19 its fourth season – a use Newcombe paid his professional representatives to help secure.

20 9. Newcombe brings this civil action for declaratory and injunctive relief to
21 clarify his and Davies’ authorship (and any ownership rights deriving therefrom or
22 otherwise) under 17 U.S.C. § 201(a) in and to the Subject Works.

23 JURISDICTION AND VENUE

24 10. This Court has subject matter jurisdiction over this action pursuant to 28
25 U.S.C. § 1338(a) & (b) in that it arises under the applicable Acts of Congress relating to
26 copyright.

27 11. The acts and conduct described below were in whole or in part conceived,
28 carried out and made effective within the Northern District of California. Both Newcombe

1 and Davies transact or have transacted business within this District, as described in part
2 hereinabove.

3 12. Venue is proper in this District pursuant to 28 U.S.C. §1400(a) in that this
4 action arises under federal copyright law and Davies “resides or may be found” in this
5 District, since Davies would be amenable to personal jurisdiction in this District if it were a
6 separate state. Alternatively, venue is proper in this District pursuant to 28 U.S.C. §1391(b)
7 in that a substantial part of the events giving rise to the claims in issue occurred here.

8 **THE PARTIES**

9 13. Plaintiff BRIAN JONESTOWN MASSACRE is a doing business as
10 designation for ANTON NEWCOMBE, an individual residing in Berlin, Germany. The
11 BJM project, which continues to this day, is Newcombe’s brainchild, and he in turn is
12 the driving creative force behind it.

13 14. Defendant JEFFREY DAVIES is an individual who, on information and
14 belief, resides in Los Angeles, California.

15 **CLAIM FOR DECLARATORY RELIEF**

16 15. According to Davies’ lawyer, the musical compositions or songs in
17 controversy are listed on Exhibit B attached hereto; the sound recordings in controversy
18 are listed on Exhibit C attached hereto. These musical compositions and sound
19 recordings have been and shall be referred to collectively herein as the “Subject Works.”

20 16. There is an actual and justiciable controversy between the parties. Davies
21 claims that he is a “co-author” and thus contends he has (a) an ownership interest in
22 whole or in part in the copyrights in and to all of the Subject Works, (b) the right to a
23 share of all gross monies received by Newcombe from the use of the Subject Works, and
24 (c) the right to such monies with interest from “inception” of the Subject Works (i.e.,
25 circa 1992-99).

26 17. Newcombe concedes that Davies has a 50% ownership interest in the
27 copyrights in and to the three songs for which there are contemporaneous copyright
28 registrations: “Straight Up and Down,” “Straight Up and Down II” and “Monster.”

1 However, Newcombe denies that Davies has any authorship rights pursuant to 17 U.S.C.
2 § 201(a) or any other ownership or administration rights in or to any of the other Subject
3 Works.

4 18. Moreover, during the past two decades, Newcombe has consistently
5 claimed sole authorship to these other works and has exclusively administered and
6 exploited them throughout the world. Accordingly, any claim of right that Davies may
7 have had in any of the Subject Works other than “Straight Up and Down,” “Straight Up
8 and Down II” and “Monster” are barred by the applicable three-year limitations period
9 under 17 U.S.C. § 507(b).

10 19. Newcombe stands ready, willing and able, and has endeavored, to account
11 and pay Davies for his portion of the monies received from the use of “Straight Up and
12 Down,” “Straight Up and Down II” and “Monster” – the copyrights in and to which
13 Newcombe has controlled and administered at all relevant times – net of actual bona fide
14 commissions, fees and other expenses incurred in connection with the receipt of those
15 monies, for the applicable three-year limitations period under 17 U.S.C. § 507(b).

16 20. A judicial declaration of the parties’ respective rights and obligations in
17 relation to the Subject Works is necessary and appropriate.

18 21. Accordingly, Newcombe seeks a judgment declaring the parties’ respective
19 rights and obligations as set forth below.

20 PRAYER FOR RELIEF

21 WHEREFORE, Newcombe respectfully requests judgment against Davies as
22 follows:

23 1. A declaration that (A) Davies neither had nor has any authorship interest
24 under 17 U.S.C. § 201(a) or any other ownership interest in any of the Subject Works
25 other than a 50% interest in the copyrights in and to the three songs entitled “Straight Up
26 and Down,” “Straight Up and Down II” and “Monster;” (B) any authorship claims that
27 Davies may have had under 17 U.S.C. § 201(a) in any of the Subject Works other than
28 “Straight Up and Down,” “Straight Up and Down II” and “Monster” are barred by the

1 applicable three-year limitations period under 17 U.S.C. § 507(b); (C) Davies has a right
2 only to 50% of the monies received by Newcombe from the use of “Straight Up and
3 Down,” “Straight Up and Down II” and “Monster,” net of actual bona fide commissions,
4 fees and other expenses incurred in connection with the receipt of those monies; and (D)
5 Davies’ right to his portion of such monies for those three songs is limited to the
6 applicable three-year limitations period under 17 U.S.C. § 507(b).

7 2. An injunction restraining Davies, his agents, representatives, and all
8 persons acting in concert with him or them, from making any further false claims or
9 representations that Davies has any authorship or ownership interest in any of the other
10 Subject Works, and otherwise acting contrary to this Court’s declaration of rights;

11 3. Costs and attorneys’ fees incurred herein; and

12 4. Such other and further relief as this Court deems just.

13
14 Dated: February 24, 2014

PHILLIPS, ERLEWINE & GIVEN LLP

15
16 By: /s/ David M. Given

17 David M. Given

18 Attorneys for Plaintiff

19
20 **DEMAND FOR JURY TRIAL**

21 Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules
22 of Civil Procedure.

23 Dated: February 24, 2014

PHILLIPS, ERLEWINE & GIVEN LLP

24
25 By: /s/ David M. Given

26 David M. Given

27 Attorneys for Plaintiff
28

EXHIBIT A

LAW OFFICE OF
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EMAIL BRIANMCPHERSON@GMAIL.COM

June 24, 2013

VIA EMAIL/CERTIFIED MAIL R.R.R.

Barry Simons, Esq.
1655 Polk St. Suite #2
San Francisco, CA 94109

Re: Jeffrey Davies

Dear Barry:

As you know, this firm represents Jeffrey Davies. I have become aware that certain sound recordings and musical compositions co-owned by my client have been exploited by your client Anton Newcombe without my client's consent and without payment to my client.

Specifically, and without limitation, my client is the co-author of the following musical compositions ("Compositions"):

- 1 - That Girl Suicide (50% J Davies/50% A. Newcombe)
- 2 - Hyper-ventilation (50% J Davies/50% A. Newcombe)
- 3 - Straight Up and Down (50% J Davies/50% A. Newcombe)
- 4 - Monster (50% J Davies/50% A. Newcombe)
- 5 - (I Love You) Always (100% J Davies)
- 6 - Straight Up and Down II (50% J Davies/50% A. Newcombe)
- 7 - Stolen (50% J Davies/50% A. Newcombe)
- 8 - Jeremy Davies' Tall Tale (100% J Davies)

I attach a copy of the search results from the USPTO database which shows the registration status of the PA registrations for three of the Compositions. As you are no doubt aware, these registrations establish a presumption of my client's ownership and additionally entitle him to sue any infringer for statutory damages based on the willful infringement of his rights.

Additionally, my client contributed to the creation of and as such is a co-author (in shares to be determined) of the following sound recordings ("Masters"):

Album Title: **Space Girl and Other Favorites**

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- 1 - Crushed (played guitar)
- 2 - That Girl Suicide (played guitar)
- 3 - When I was Yesterday (played guitar)

Album Title: **Methodrone**

- 1 - Wisdom (played guitar)
- 2 - Crushed (played guitar)
- 3 - That Girl Suicide (played guitar)
- 4 - Wasted (played guitar)
- 5 - Hyper-ventilation (played guitar)

Album Title: **Take It From The Man**

- 1- Vacuum Boots (played guitar)
- 2 - Who! (played guitar and sang back-up vocals)
- 3 - Oh Lord (played guitar)
- 4 - Caress (played guitar)
- 5 - Straight Up and Down (played guitar, sang back-up on long version)
- 6 - Monster (played guitar)
- 7 - BSA (played guitar)
- 8 - Mary, Please (played guitar)
- 9 - Cabin Fever (played guitar)
- 10 - The B Song (played guitar)
- 11 - Straight Up and Down - long version (played guitar and sang)

Album Title: **Their Satanic Majesty's Second Request**

- 1 - Anenome (played guitar)

Album Title: **Thank God For Mental Illness**

- 1 - Spanish B (played guitar)
- 2 - 13 (played guitar)
- 3 - The Ballad of Jim Jones (played guitar)
- 4 - Too Crazy to Care (played guitar)
- 5 - Sound of Confusion (medley) (played on "Wasted")

Album Title: **Strung Out in Heaven**

- 1 - Going To Hell (played guitar)

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- 2 - Jennifer (played guitar)
- 3 - I've Been Waiting (played guitar)
- 4 - Wisdom (played guitar)
- 5 - Dawn (played guitar)

Album Title: **Bravery, Repetition and Noise**

- 1 - Just For Today (played guitar)
- 2 - Stolen (co-wrote with Anton at Roxanne's house years before the actual recording - did not play on this recording)
- 3 - Nevertheless (played guitar)
- 4 - You Have Been Disconnected (played guitar)
- 5 - Leave Nothing For Sancho (played guitar)
- 6 - (I Love You)Always (wrote 100% and played guitar, organ, vocals, some percussion)

Album Title: **If I Love You E.P.**

- 1 - You Have Been Disconnected (played guitar)
- 2 - Swallowtail (this song is mis-titled on the album, it is actually supposed to be called "The Quiet Song" live on KUSF, 1992 - played guitar)
- 3 - The Quiet Song (this song is mis-titled on the album, it is supposed to be called "Swallowtail" - live recording - played guitar)
- 4 - Jeremy Davies' Tall Tale

Album Title: **Tepid Peppermint Wonderland: A Retrospective**

- 1 - Who! (played guitar)
- 2 - Straight Up and Down (co-wrote 50% and played guitar(sang back-up on long version))
- 3 - Anenome (played guitar)
- 4 - Wisdom (played guitar)
- 5 - Just For Today (played guitar)
- 6 - Vacuum Boots (played guitar)
- 7 - That Girl Suicide (played guitar)
- 8 - Nevertheless (played guitar)
- 9 - Let Me Stand Next To Your Flower (live) (played guitar)
- 10 - Hide And Seek (live) (played)
- 11 - Mary, Please (played guitar)
- 12 - Oh Lord (played guitar)

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- 13 - Swallowtail (live)
- 14 - The Ballad of Jim Jones (played guitar)
- 15 - Sue (played guitar)

Album Title: **Love E.P.**

- 1 - I've Been Waiting (played guitar)

Album Title: **Singles Collection 1992-2011**

- 1 - Anenome (played guitar)

Album Title: **Your Side of the Story**

(We require information on the recording dates to determine whether or not my client played on any of the masters)

Album Title: **Harbor Boat Trips: 01 Copenhagen** by Trentemoller

- 1 - Anenome (played guitar)

As you acknowledged in our recent telephone conferences, my client is entitled to a share of all income and proceeds from all exploitations of the Compositions and the Masters. I know you are motivated to settle this matter without regard to litigation, as is my client. Before we can reach a settlement, I need you to provide me with any and all royalty statements and license agreements related to the Masters and Compositions. Specifically, and without limitation, I need the following:

- 1 - The synch/master licenses for the Master/Composition "Straight Up and Down" in connection with the television series "Boardwalk Empire" and "Nash Bridges" and for use of the Compositions and/or Masters in any context (TV show, movie, trailer, advertisement) ;
- 2 - All ASCAP writer and publisher statements for the Compositions from inception to date;
- 3 - All SoundExchange statements for the Masters;
- 4 - All statements from any third party publishing company or administrator regarding the Compositions.
- 5- Any royalty statements or distribution company statements for the Masters.

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Once I get the aforementioned documents I can formulate a proposal for settlement, but please be advised that my client will administer his share of the Compositions in any event.

Nothing herein should be considered by you or any other, person, entity or firm to be a waiver of any of my client's rights or remedies, all of which are expressly reserved. Moreover, nothing herein should be considered as a full recitation of all of the facts or circumstances relating to this matter. Finally, please be advised that the schedule of Masters and Compositions is just a working list and is subject to revision.

Best wishes.

Sincerely,



Brian H. McPherson

BHM: hns

cc: Jeffrey Davies

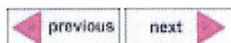
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Public Catalog

Copyright Catalog (1978 to present)

Search Request: Left Anchored Title = Straight up and down

Search Results: Displaying 6 of 12 entries

[Labeled View](#)

Straight up and down ; Monster ; Straight up and down II.

Type of Work: Music

Registration Number / Date: PA0000936415 / 1999-05-03

Title: Straight up and down ; Monster ; Straight up and down II.

Appears in: [Take it from the man! Tangible Records TAN-1025, c1996. Compact disc](#)

Publisher Number: Tangible Records TAN-1025

Performer: Performed by the Brian Jonestown Massacre.

Copyright Claimant: Anton Newcombe, Jeffrey Davies

Date of Creation: 1996

Date of Publication: 1995-12-15

Authorship on Application: words, music: Anton Newcombe, 1967-, & Jeffrey Davies, 1967-.

Copyright Note: C.O. correspondence.

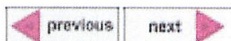
Variant title: Straight up and down

Other Title: Monster

Straight up and down II

Take it from the man!

Names: [Newcombe, Anton, 1967-](#)
[Davies, Jeffrey, 1967-](#)
[Brian Jonestown Massacre](#)



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EXHIBIT B

EXHIBIT B

(Musical Compositions or Songs)

1. *That Girl Suicide*
2. *Hyper-ventilation*
3. *Straight Up and Down**
4. *Monster**
5. *(I Love You) Always*
6. *Straight Up and Down II**
7. *Stolen*
8. *Jeremy Davies' Tall Tale*

* Per Copyright Reg. No. PA0000936415 (effective date May 3, 1999), words and music 50% A. Newcombe, 50% J. Davies.

EXHIBIT C

EXHIBIT C

(Sound Recordings)

Album Title: **Space Girl and Other Favorites (1993)**

1. *Crushed*
2. *That Girl Suicide*
3. *When I was Yesterday*

Album Title: **Methodrone (1995)**

1. *Wisdom*
2. *Crushed*
3. *That Girl Suicide*
4. *Wasted*
5. *Hyper-ventilation*

Album Title: **Take It from the Man! (1996)***

1. *Vacuum Boots*
2. *Who!*
3. *Oh Lord*
4. *Caress*
5. *Straight Up and Down*
6. *Monster*
7. *BSA*
8. *Mary, Please*
9. *Cabin Fever*
10. *The B Song*
11. *Straight Up and Down - long version*

Album Title: **Their Satanic Majesty's Second Request (1996)†**

1. *Anenome*

* Per Copyright Reg. No. SR0000261839 (effective date May 3, 1999), sound recording 100% A. Newcombe.

† Per Copyright Reg. No. SR0000261840 (effective date May 3, 1999), sound recording 100% A. Newcombe.

Album Title: **Thank God for Mental Illness (1996)**[‡]

1. *Spanish B*
2. *13*
3. *The Ballad of Jim Jones*
4. *Too Crazy to Care*
5. *Sound of Confusion* (medley)

Album Title: **Strung Out in Heaven (1998)**

1. *Going To Hell*
2. *Jennifer*
3. *I've Been Waiting*
4. *Wisdom*
5. *Dawn*

Album Title: **Bravery, Repetition and Noise (2001)**

1. *Just for Today*
2. *Nevertheless*
3. *You Have Been Disconnected*
4. *Leave Nothing for Sancho*
5. *(I Love You) Always*

Album Title: **If I Love You E.P. (2001)**

1. *You Have Been Disconnected*
2. *Swallowtail*
3. *The Quiet Song*

[‡] Per Copyright Registration Application (received May 15, 1997), all sound recordings 100% A. Newcombe.

Album Title: **Tepid Peppermint Wonderland: A Retrospective (2004)**

1. *Who!**
2. *Straight Up and Down**
3. *Anenome†*
4. *Wisdom*
5. *Just for Today*
6. *Vacuum Boots**
7. *That Girl Suicide*
8. *Nevertheless*
9. *Let Me Stand Next To Your Flower* (live)
10. *Hide And Seek* (live)
11. *Mary, Please**
12. *Oh Lord**
13. *Swallowtail* (live)
14. *The Ballad of Jim Jones‡*
15. *Sue*

Album Title: **Love E.P. (1998)**

1. *I've Been Waiting*

Album Title: **Singles Collection 1992-2011 (2011)**

1. *Anenome†*

Album Title: **Harbor Boat Trips: 01 Copenhagen** by Trentemoller (2009)

1. *Anenome†*